FILE COPY

FEB 28 1973

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1972

NO. 72-1067

COLUMBIA STANDARD CORPORATION,
Petitioner,

v.

RANCHERS EXPLORATION & DEVELOPMENT CORPORATION,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

POOLE, TINNIN, DANFELSER & MARTIN
Marshall G. Martin
Paull Mines
816 Bank of New Mexico Building
Albuquerque, New Mexico

Attorneys for Respondent
Ranchers Exploration & Development Corporation

February, 1973

SUBJECT INDEX

Page

Opinions Below 2
Jurisdiction 2
Questions Presented 2
Statutes Involved 2
Statement 2
Reasons for Denying Writ 4

I. RANCHERS HAS MADE A MINERAL DISCOVERY ON THE MAJORITY OF ITS CLAIMS AND THE DECISION OF THE COURT OF APPEALS DOES NOT PERMIT PUBLIC LAND TO BE APPROPRIATED WITHOUT DISCOVERY OF MINERAL IN PLACE 5

II. THE COURT OF APPEALS DID NOT HOLD THAT A MINERAL DISCOVERY ON ONE CLAIM WILL VALIDATE ADJOINING CLAIMS ON WHICH THERE IS NO MINERAL DISCOVERY 8

III. THE DECISION OF THE COURT OF APPEALS DOES NOT ERRONEOUSLY CONCEIVE OR ENLARGE THE GOOD FAITH REQUIREMENT FOR RELOCATION OF DEFECTIVE MINING CLAIMS 10

IV. THE DECISION OF THE COURT OF APPEALS DOES NOT ENCOURAGE AND PROTECT LARGE AND SPECULATIVE AGGREGATIONS OF PUBLIC DOMAIN WITHOUT EXPLORATION OR DEVELOPMENT 12

Conclusion 13

CITATION OF AUTHORITIES

CASES — Page

Adams v. Benedict
64 N.M. 234, 327 P.2d 308 (1958) 6, 8

Bagg v. New Jersey Loan Co.
88 Ariz. 182, 354 P.2d 40 (1960) 11

Berto v. Wilson
74 Nev. 128, 324 P.2d 843 (1958) 6, 8

Chrisman v. Miller
197 U.S. 313 (1905) 6, 7

Duffield v. San Francisco Chemical Co.
205 Fed. 480 (9th Cir. 1913) 10

Henault Mining Co. v. Tysk
419 F.2d 766 (9th Cir. 1969) 7

Johnson v. Ryan
43 N.M. 127, 86 P.2d 1040 (1939) 7, 11

Kanab Uranium Corp. v. Consolidated Uranium Mines
227 F.2d 434 (10th Cir. 1955) 9

Nevada-Pacific Development Corp. v. Gustin
226 F.2d 286 (9th Cir. 1955), *cert denied*,
351 U.S. 930 (1956) 6

Rummell v. Bailey
7 Utah 2d 137, 320 P.2d 653 (1958) 6, 7, 8, 9

Union Oil Co. v. Smith
249 U.S. 337 (1919) 10

Western Standard Uranium Co. v. Thurston
355 P.2d 377 (Wyo. 1960) 6, 7, 8

Winslow v. Burns
47 N.M. 29, 132 P.2d 1048 (1943) 6, 9, 11

STATUTES — Page

28 U.S.C. §1332 2

28 U.S.C. §1334 2

30 U.S.C. §23 6

N.M. Stat. Ann. §63-2-3.1 7

TREATISE

1 AMERICAN LAW OF MINING (1972), §4.53 6

In the Supreme Court of the United States

October Term, 1972

NO. 72-1067

COLUMBIA STANDARD CORPORATION,
Petitioner,

v.

RANCHERS EXPLORATION & DEVELOPMENT CORPORATION,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent prays that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit be denied.

OPINIONS BELOW

The opinions below are adequately recited in the Petition.

JURISDICTION

The jurisdictional requisites are adequately recited in the Petition.

QUESTIONS PRESENTED

Respondent Ranchers respectfully submits that the following are the appropriate questions presented:

1. Does a subsequent and rival locator of mining claims under the Mineral Location Act of 1872 who maintains a possessory action have the burden of establishing his superior right to the claims in issue based upon the strength of his own rights and not upon the weakness of his adversary's rights?

2. Is the finding that Respondent Ranchers had made a mineral discovery on some of its claims supported by substantial evidence and not clearly erroneous?

3. Is the finding of Petitioner Columbia's lack of good faith entry on to the claims in issue supported by substantial evidence and not clearly erroneous?

STATUTES INVOLVED

The statutory provisions involved are adequately presented in the Petition

STATEMENT

Respondent Ranchers must controvert Petitioner Columbia's statement of the case since it is materially incomplete and misleading.

First, Federal jurisdiction was predicated upon the diversity of citizenship of the parties under 28 U.S.C. §1332, not §1334.

Second, Petitioner Columbia's contention that Respondent Ranchers failed to establish by either physical evidence or

radiometric probes the presence of any mineral in place in Ranchers' deep discovery drill holes ignores the evidence. Petitioner Columbia's contentions are nothing more than an attempt to reargue conflicting factual issues already argued in the trial court and the Court of Appeals. Respondent Ranchers' evidence at trial included the following:

1. All of Respondent Ranchers' deep discovery drill holes disclosed uranium mineral in place. The mineralization disclosed ranged from barely detectable amounts of uranium to obvious mineralization. (A. 95).

2. Respondent Ranchers' radiometric probes are reliable to establish the presence of uranium minerals in place in the Grants Mining Belt (the location of the claims in issue). (A. 92-93). The method utilized by Respondent Ranchers is the same method utilized by the Atomic Energy Commission to calculate the amount of existing reserves of uranium ore and are relied upon heavily by the mining industry. (A. 88, 110).

3. The presence of the favorable Morrison Formation, known to be productive of uranium in the Grants Mining Belt, is physical evidence of its mineral discovery. (A. 93).

4. There is evidence of a known commercial deposit of uranium ore in close proximity to the claims in issue. (A. 94).

5. The evidence showed the existence of channels or trends which indicate it is "quite likely that the [uranium ore] deposits could extend over into the area of [the claims in issue]." (A. 94).

6. The favorability of the sands, i.e., whether bleached or unbleached, is further physical evidence of Respondent Ranchers' mineral discovery. (A. 94).

Third, Petitioner Columbia's summary of the state of knowledge of its location agent, Carlson, fails to recite significant facts known by him. Not only did Carlson know of Respondent Ranchers' interest in the area since 1967 but Carlson, knowing Respondent Ranchers asserted it held valid claims, also had actually participated in a settlement with Respondent Ranchers that involved the very same claims here in issue. (A. 74, 75, 76, 78). In addition, prior to any location by

Carlson on behalf of his new employer, Petitioner Columbia. Carlson had knowledge of Respondent Ranchers' deep drilling activity and suspected that such deep drilling would result in the discovery of uranium mineralization. (A. 74-75, 77, 81).

Fourth, Petitioner Columbia's summary of the District Court's Memorandum Opinion and Order (App. A, Pet., 11) misinterprets the thrust of that Opinion and Order. Petitioner Columbia apparently views the lower courts' decisions as finally determining Ranchers' rights to possession as against the world. In fact, the decision is nothing more than a determination of the bare possessory rights of the two parties. The District Court did not hold that the land held by Respondent Ranchers was not open to relocation generally. Rather the District Court held that—as between Ranchers and Columbia—Petitioner Columbia could not relocate the claims in question, since its attempted relocation was not made in good faith as the term is used in mining law. The alternative holding of the District Court was that Petitioner Columbia failed to meet its burden of proof to uphold its attempted relocation of the claims in dispute.

REASON FOR DENYING WRIT

Rule 19 of this Court indicates a petition for writ of certiorari will be granted only where there are special and important reasons for granting the same. Petitioner Columbia has urged four separate reasons why this case deserves the exercise of this Court's sound judicial discretion. Respondent Ranchers submits that each of the reasons propounded by Petitioner Columbia is without legal or factual substance.

In essence, the majority of Petitioner Columbia's discussion is a reargument of factual issues decided against it by the trial court which are peculiar to this dispute between these two parties. Petitioner Columbia has ignored the thrust of the trial and appellate court decisions which determined possessory rights between the parties upon a unique factual situation and which did not purport to result in any broad new rule of law affecting the public interest or third parties who do not occupy

a position similar to Petitioner's. Further, Petitioner Columbia fails to acknowledge the facts developed in Respondent Ranchers' favor at the trial court level upon which the District Court based its finding. Although, as in all cases, the dispute is of extreme importance to the two parties, Petitioner Columbia overlooks the Court of Appeal's decision's limited application to situations which do not involve a similar, unique factual situation.

As an aid to this Court's review, Respondent Ranchers' position that the petition should be denied can be summarized as follows:

1. The lower courts' decisions turned on the sufficiency of the evidence concerning factual issues arising from the unique circumstances in which the litigants found themselves at the commencement of the dispute.

2. The purported conflict among decisions of the Courts of Appeals are non-existent.

3. The decisions below, having been based on alternative holdings, are correct even if one of the alternative holdings is incorrect. This court therefore is unlikely to reach any issue of substantial importance.

4. The decisions below are legally correct, supported by well established precedent and are supported by substantial evidence.

I.

RANCHERS HAS MADE A MINERAL DISCOVERY ON THE MAJORITY OF ITS CLAIMS AND THE DECISION OF THE COURT OF APPEALS DOES NOT PERMIT PUBLIC LAND TO BE APPROPRIATED WITHOUT DISCOVERY OF MINERAL IN PLACE.

Petitioner Columbia first argues that Ranchers has failed to make a mineral discovery on any of its claims and that the decision of the Court of Appeals violates one of the most basic principles of mining law: the necessity of a mineral discovery.

Respondent Ranchers agrees that a locator must establish a

mineral discovery before he may appropriate any portion of the public domain. 30 U.S.C. §23. Further, the application of the "prudent person" test of *Chrisman v. Miller,* 197 U.S. 313 (1905), is well accepted.

Petitioner Columbia neglects to recognize or cite the equally important principle that in disputes between rival locators, the technical requirements of mineral discovery are liberally applied, since both claimants are presumably disputing the right to extract the same mineral. *Chrisman v. Miller, supra; Nevada-Pacific Development Corp. v. Gustin,* 226 F.2d 286 (9th Cir. 1955), *cert. denied,* 351 U.S. 930 (1956); 1 AMERICAN LAW OF MINING §4.53 (1972). Finally, it is well established in New Mexico that the evidence of the prior locator must be viewed in its most favorable light. *Winslow v. Burns,* 47 N.M. 29, 132 P.2d 1048 (1943). It is with Petitioner Columbia's application of these principles, or its failure of application, that Respondent Ranchers takes dispute.

In arguing that Respondent Ranchers has failed to make a mineral discovery Petitioner Columbia necessarily argues the disputed factual issues concerning the evidentiary sufficiency of Respondent Ranchers' radiometric probes to establish the presence of uranium mineral in place and satisfy the "prudent person" test. Thus, Petitioner Columbia ignores the rival locator test of mineral discovery, the principle of *Winslow v. Burns, supra,* the evidence of Respondent Ranchers' mineral discovery as indicated by witness Fitch (A. 93-95), and the testimony of their own witnesses (A. 116, 120-124). The factors utilized by Respondent Ranchers to establish its mineral discovery have been repeatedly recognized by several state supreme courts. *Rummell v. Bailey,* 7 Utah 2d 137, 320 P.2d 653 (1958); *Berto v. Wilson,* 74 Nev. 128, 324 P.2d 843 (1958); *Western Standard Uranium Co. v. Thurston,* 355 P.2d 377 (Wyo. 1960).

Petitioner Columbia's contention that the decision of the Court of Appeals contravenes *Adams v. Benedict,* 64 N.M. 234, 327 P.2d 308 (1958), is likewise misplaced. *Adams v. Benedict* states the requirement of mineral discovery to perfect a claim (already a federal requirement) and the further requirement that the mineral discovered be cut or exposed by the discovery work

drill hole under N.M. Stat. Ann. 63-2-3.1. However, *Adams v. Benedict* does not discuss, as asserted by Petitioner Columbia, the effect of a locator's failure to record a discovery work affidavit. The effect of a locator's failure to record a required document was discussed by the New Mexico Supreme Court in *Johnson v. Ryan,* 43 N.M. 127, 86 P.2d 1040 (1939). The holding of that case indicates that as long as the locator has substantially complied with the New Mexico location requirements a forfeiture will not result. Respondent Ranchers established its substantial compliance with N.M. Stat. Ann. §63-2-3.1, since it did everything required by that statute except to meet the technical formality of filing a discovery work affidavit. Petitioner Columbia was in no position to complain of this technical deficiency in view of the knowledge of its locating agent, Carlson, who knew, or at least constructively knew within the meaning of *Johnson v. Ryan, supra,* that Respondent Ranchers' deep drilling had resulted in the disclosure of uranium mineralization in place. State courts have reached analogous results where a locator has failed to file an affidavit under the so-called drill hole law. *E.g., Western Standard Uranium Co. v. Thurston,* 355 P.2d 377 (Wyo. 1960).

Petitioner Columbia's attempt to create a conflict among decisions of the Courts of Appeals is also without merit. The decision of the Court of Appeals below in no way conflicts with the principles enunciated in *Henault Mining Co. v. Tysk,* 419 F.2d 766 (9th Cir. 1969). *Henault Mining Co. v. Tysk* does not purport to discuss what constitutes the discovery of uranium, a mineral which emits gamma ray radiation which is capable of being detected and measured. Nor does the case purport to apply the rival locator test of mineral discovery, since the case involved a dispute among different classes of users of the public domain. *See, Chrisman v. Miller, supra.* As indicated in the Statement of the Case, Respondent Ranchers' mineral discovery is based on at least five evidentiary grounds. Although one ground alone might not be sufficient to establish a mineral discovery, all five in combination certainly meet the tests as developed in the various states. *E.g., Rummell v. Bailey,*

supra; Berto v. Wilson, 74 Nev. 128, 324 P.2d 843 (1958); *Western Standard Uranium Co. v. Thurston,* 355 P.2d 377 (Wyo. 1960).

II.

THE COURT OF APPEALS DID NOT HOLD THAT A MINERAL DISCOVERY ON ONE CLAIM WILL VALIDATE ADJOINING CLAIMS ON WHICH THERE IS NO MINERAL DISCOVERY.

Respondent Ranchers never contended below nor does it now contend that a mineral discovery on one claim will suffice to validate contiguous or adjoining claims. Respondent Ranchers agrees that a mineral discovery on each and every claim is necessary before the claim can be appropriated from the public domain. These principles are consistent with the decision of the Court of Appeals.

Even though the Court of Appeals has upheld Respondent Rancher's rights to possession as superior to Petitioner Columbia's, the Court of Appeals' decision does not hold that Respondent Ranchers has validly appropriated the claims on which Respondent Ranchers has yet to make a mineral discovery. The Court of Appeals and the District Court below merely held that Petitioner Columbia's proof failed to establish which of Respondent Ranchers' mining claims were unperfected or, in the alternative, that the evidence failed to show that Petitioner Columbia had relocated the claims in good faith as required by the mining law. (Since Petitioner Columbia discusses the concept of good faith in its third argument, discussion of the mining concept of good faith will be postponed to Argument III, *infra.*)

It is the well established law of the State of New Mexico and other jurisdictions that in order for a junior locator to succeed in a possessory action brought by it against a prior locator, the junior locator must establish its superior possessory rights. *Adams v. Benedict,* 64 N.M. 234, 327 P.2d 308 (1958); *Rummell*

v. Bailey, 7 Utah 2d 137, 320 P.2d 653, 659 (1958) ("Where a mining claim has been located, it will ordinarily be presumed that the locator complied with the law and made a discovery, and the burden would be upon the [subsequent locator] to affirmatively show there was no such discovery . . ." [footnote omitted]). The New Mexico rule has been further developed to the point where the evidence of the prior locator must be viewed in its most favorable light – in essence there is a presumption in favor of the senior locator. *Winslow v. Burns*, 47 N.M. 29, 132 P.2d 1048 (1943). These principles have received recognition in the federal courts. *Kanab Uranium Corp. v. Consolidated Uranium Mines*, 227 F.2d 434 (10th Cir. 1955). The decisions of the Court of Appeals and the District Court below necessarily reflected that at trial counsel for Respondent Ranchers maintained (A. 57, 64, 102-103) and it was stipulated (A. 59) that the maps and overlays admitted as evidence were not true survey representations of the area in issue. In fact, there was evidence that Petitioner Columbia's claims were misdescribed, since it tied its claims to what it thought was the northeast corner of Section 22 but which in fact was the intersection of the north end line of Section 22 and the Canada de Los Alamos Land Grant boundary. (A. 79-80,90). As a result Petitioner Columbia failed to establish which of its claims, if any, did not conflict with Respondent Ranchers' perfected claims. As was stated by the Court of Appeals, Carlson, Petitioner Columbia's location agent, did not testify as to the location of Respondent Ranchers' known deep discovery drill holes on a claim by claim basis. (Ct. App. Op., App. B, Pet., 19). Thus, Petitioner Columbia has simply failed to acknowledge that the lower courts' holdings are based on disputed factual issues and Columbia's failures of proof. Such decisions can hardly be characterized as a departure of the applicable decisions of this Court.

Were Petitioner Columbia's failure to satisfy its burden not enough, the lower courts' alternative holding that Petitioner Columbia failed to establish a good faith entry on the claims in issue justifies dismissal of its claim.

III.
THE DECISION OF THE COURT OF APPEALS DOES NOT ERRONEOUSLY CONCEIVE OR ENLARGE THE GOOD FAITH REQUIREMENT FOR RELOCATION OF DEFECTIVE MINING CLAIMS.

The alternative holding of the Court of Appeals was that Petitioner Columbia failed to establish by its evidence that its entry onto the claims in issue was made in good faith, a concept derived from this Court's holding in *Union Oil Co v. Smith*, 249 U.S. 337 (1919). Consequently, Petitioner Columbia was deemed to have gained no interest in the claims. Petitioner Columbia attempts to portray this alternative holding as being in conflict with the decision of the Ninth Circuit in *Duffield v. San Francisco Chemical Co.*, 205 Fed. 480 (9th Cir. 1913), a sixty year old case which has attracted little or no attention and which does not purport to establish principles governing the factual situation present in this case.

The thrust of Petitioner Columbia's objections to the decision of the Court of Appeals below is its apparent belief that its entry has been tainted with an absence of good faith as a result of its mere knowledge of the existence of Respondent Ranchers' prior claims. Respondent Ranchers did not contend below nor does it now contend that mere knowledge of a prior locator's claims would justify a finding of an absence of good faith entry. Respondent Ranchers agrees to hold otherwise would frustrate the policy of permitting challenges to invalid earlier locations. The District Court's finding of fact that Petitioner Columbia's entry lacked good faith was not based upon Petitioner Columbia's mere knowledge of Respondent Ranchers' prior claims. The evidence upon which the District Court necessarily made its finding and upon which the Court of Appeals upheld such finding as not being clearly erroneous included:

1. The participation of Petitioner Columbia's locating agent, Carlson, in a settlement agreement involving the same

claims as a result of which Carlson knew Respondent Ranchers asserted it held valid claims. (A. 74,75,76,78).

2. Carlson's knowledge of Respondent Ranchers' deep drilling activity which he suspected would result in the discovery of uranium mineralization. (A. 74-75,77,81).

3. Petitioner Columbia's title search for the express, sole purpose of detecting defective titles (A. 77-78).

4. Petitioner Columbia's wholesale relocation of the claims based upon its belief that Ranchers' title was defective (A. 102) without attempting to determine which of Respondent Ranchers' claims had been perfected by deep discovery drilling even though it had knowledge or notice of Ranchers' discovery activities. (A. 65,66,83).

5. Petitioner Columbia's relocation on a weekend. (A. 64,79).

It is thus apparent from the foregoing that the District Court's finding of the absence of good faith entry, upheld by the Court of Appeals as not being clearly erroneous, is based upon other significant facts in addition to Petitioner Columbia's mere knowledge of Respondent Ranchers' prior claims. The significance of good faith entry as developed in this case has been repeatedly recognized by the state supreme courts. *Winslow v. Burns,* 47 N.M. 29, 132 P.2d 1048 (1943) (lack of good faith vitiates any attempt to initiate mining rights); *Johnson v. Ryan,* 43 N.M. 127, 86 P.2d 1040 (1939); *Bagg v. New Jersey Loan Co.,* 88 Ariz. 182, 354 P.2d 40 (1960) (relocation based upon technical deficiencies in the right of prior locator is not in good faith).

Notwithstanding the extent of its knowledge, Petitioner Columbia also argues that it had no duty of inquiry under *Johnson v. Ryan,* 43 N.M. 127, 86 P.2d 1040 (1939), to insure a good faith entry. Petitioner Columbia urges the inquiry requirements of *Johnson v. Ryan* are not applicable to it, since a general duty of inquiry could well frustrate challenges to invalid earlier locations. (Pet., 9). This contention, however, overstates the extent to which the decision of the Court of Appeals placed a duty of inquiry on Petitioner Columbia.

The duty of inquiry imposed by the decision of the Court of Appeals is no more than a duty to make a good faith examination of the ground in issue to determine the extent of a prior locator's location and mineral discovery. If Petitioner Columbia had made such an examination and had relocated only those claims for which it found no evidence of valid location and mineral discovery (instead of its wholesale relocation of all of Ranchers' prior claims), Petitioner Columbia would presumably have satisfied the good faith entry requirement. It is preposterous for Petitioner Columbia to suggest that the duty of inquiry imposed by the Court of Appeals, as outlined above, is onerous or would frustrate challenges to invalid earlier locations.

IV.

THE DECISION OF THE COURT OF APPEALS DOES NOT ENCOURAGE AND PROTECT LARGE AND SPECULATIVE AGGREGATIONS OF PUBLIC DOMAIN WITHOUT EXPLORATION OR DEVELOPMENT.

Petitioner Columbia without expressly setting forth the basis of its assertion predicts that the decision of the Court of Appeals will drastically limit the ability of private locators to contest invalid prior claims and thereby serve the public interest in preventing unlawful uses of the public domain. Respondent Ranchers refutes this assertion basically on the ground that Petitioner Columbia's claim was merely an action for bare possession based upon a particular set of facts which did not require the trial court to make significant determinations of questions of law.

As established above, Respondent Ranchers has made a mineral discovery on the majority of its claims. As a result, under present mining legislation as enacted by Congress, Respondent Ranchers may maintain its interest to those claims in issue as long as it performs the necessary annual assessment

work. As to those claims on which Respondent Ranchers has yet to make a mineral discovery, Petitioner Columbia's failure to prevail is directly attributable to its lack of good faith entry and its failure to meet its burden of proof. The absence of a good faith entry by Petitioner Columbia arose not from its attempted relocation of Respondent Ranchers' unperfected claims but from Petitioner Columbia's reckless overstaking of all Respondent Ranchers' claims without any investigation on the ground to determine whether Respondent Ranchers had any perfected rights therein. To reward attempted relocations of this sort would not further the orderly development of the mineral resources of this country. In addition, Columbia's failure to meet its burden that the land in issue was open to location does not work a disaster upon the orderly development of the mineral resources of this country. This alternative holding of the Court of Appeals was directly attributable to Petitioner's trial tactics of relying almost solely upon Respondent Ranchers' technical failure to record affidavits of discovery work (A. 59,102) which in retrospect proved unsuccessful.

CONCLUSION

For the foregoing reason, Respondent respectfully urges that the petition for a writ of certiorari should be denied.

Respectfully submitted,

POOLE, TINNIN, DANFELSER & MARTIN

Marshall G. Martin
Paull Mines

February, 1973